SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
OCT 10 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 1690

HALLMARK INDUSTRY,
Petitioner,

vs.

HONORABLE ROBERT F. PECKHAM, Judge of the United States District Court for the Northern District of California,
Respondent,

And

REYNOLDS METALS COMPANY, and STANRAY PACIFIC CORPORATION,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner Hallmark Industry prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-

entitled case (Court of Appeals No. 26915) handed down on February 11, 1971.

OPINIONS OF THE COURT BELOW

This case arises out of the action by the Respondent (U.S. District Judge Robert F. Peckham—hereinafter "Judge Peckham") granting judgment notwithstanding the verdict in a civil antitrust action filed in the United States District Court for the Northern District of California (*Hallmark Industry v. Reynolds Metals Co., et al.*, No. 47044).

The jury returned its verdict against the real parties in interest herein (Reynolds Metals Company—hereinafter "Reynolds"—and Stanray Pacific Corporation—hereinafter "Stanray") on June 24, 1970 after a lengthy and complex trial which took eight (8) weeks. (That verdict is not reported, but it is attached as Appendix "A" hereto.)

Immediately upon receiving the verdict, Judge Peckham polled the jury and ordered that the verdict be entered. (Reporter's Transcript—hereinafter "R.T."—3960.) Judge Peckham further stated in open Court: "The judgment has been entered as of today so the 10 days [for filing of post-verdict motions] will start running today." (R.T. 3964.) (The relevant portion of the Reporter's Transcript is set forth in Appendix "B" hereto.) The Clerk of the Court thereupon made the appropriate notation on the verdict form, dated it "5:06 p.m. Filed Wednesday June 24, 1970" signed his name and filed the document on that date. (See Clerk's nota-

tion, Appendix "A".) On the same day, the Clerk immediately made two separate entries in the civil docket, one of which stated the complete substance of the judgment. On June 29, 1970 another document designated "Judgment" was entered at the request of attorneys for Reynolds and Stanray. (This document is set forth as Appendix "C" hereto.)

On July 9, 1970 (well beyond the 10 day limit for motions for new trial and judgment notwithstanding the verdict) some fifteen (15) days after the entry of judgment on June 24, 1970, Reynolds and Stanray filed the post-verdict motions here involved. (See the relevant entries in the District Court Civil Docket, set forth as Appendix "D" hereto.) The District Court rejected petitioner's contentions that the motions should be stricken as untimely (see Appendix "E"), and, on December 11, 1970 issued its decision in favor of Reynolds and Stanray granting judgment notwithstanding the verdict or, in the alternative, a new trial. That opinion is reported as follows:

> *Hallmark Industry v. Reynolds Metals Company, et al.*, ... F.Supp..... (N.D. Cal. 1970) 1971 Trade Cases ¶ 73,409.

The opinion is also set forth as Appendix "F" hereto.

Subsequently, petitioner Hallmark Industry filed a petition in the United States Court of Appeals for the Ninth Circuit for writs of mandamus and/or prohibition, attacking the validity of Judge Peckham's order. On February 11, 1971 the Court of Appeals denied Hallmark's petition. That decision is unreported, but is set forth as Appendix "G" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 11, 1971. (See Appendix "G".) No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The overriding issue herein presented relates to the certainty and finality of judgments in federal litigation, particularly judgments entered in accordance with jury verdicts in civil antitrust cases. Also involved is the question of whether, in civil antitrust jury cases, the granting of judgments notwithstanding the verdict should be liberally accorded, or whether such judgments should be restrictively construed because they are granted in clear derogation of the right to trial by jury.

Thus, in light of the clear federal procedural policy favoring finality of judgments, and an expeditious determination of rights and obligations of the parties to the litigation without undue delay and prolongation of the proceedings, and the additional constitutional and procedural commitment to the importance of the right to trial by jury, the specific questions here presented are:

(1) Whether, in a civil antitrust case, after approximately four (4) years of pre-trial discovery culminating in an eight (8) week jury trial and six (6) days of deliberation by the jury, the resulting verdict could be set aside on the basis of untimely motions for judgment not-

withstanding the verdict and new trial filed on a date beyond the ten day period allowed for such motions, under F.R. Civ. P., Rules 50(b) and 59 subsequent to the initial entry of judgment upon the jury verdict?

(2) Whether the District Court's rulings against petitioner, granting judgment notwithstanding the verdict or a new trial, were void and clearly an abuse of discretion because the motions seeking such relief were not timely filed?

(3) Whether, when the District Judge on June 24, 1970 in open Court ordered that judgment be entered upon the jury verdict returned that day, and the Clerk made a notation on the verdict form, signed, entered and filed same on that date and likewise made a separate notation on the civil docket reflecting the complete substance of the judgment, and the District Judge stated in open Court that the 10 day period for filing of post-judgment motions would begin to run as of that date, was the filing of motions for judgment notwithstanding the verdict and/or new trial some 15 days later untimely?

(4) After the District Judge orders judgment to be immediately entered upon a jury verdict, states that the 10 day period for post-judgment motions shall start running as of that date, and the Clerk makes an appropriate notation on the verdict form, signs, and files the verdict, and separately enters the substance of the verdict-judgment in the Civil Docket, does the subsequent preparation and filing of another document designated "judgment" which merely duplicates and repeats the terms and substance of the previously entered judgment, expand the otherwise strict 10 day limitation period for the filing of

motions for judgment notwithstanding the verdict and new trial?

STATUTES INVOLVED

Federal Rules of Civil Procedure.

The relevant rules provide in pertinent part:

(1) "Rule 50. *Motion For a Directed Verdict and for Judgment Notwithstanding the Verdict.*

"(a) *Motion for Directed Verdict: When Made; Effect* . . .

"(b) *Motion for Judgment Nothwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

"(c) *Same: Conditional Rulings on Grant of Motion.* (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. (2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

"(d) *Same: Denial of Motion. . . .*"

(2) "Rule 58. *Entry of Judgment.*

"Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief,

or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

(3) "Rule 59. *New Trials; Amendment of Judgments*

"(a) *Grounds.* . . .

"(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) *Time for Serving Affidavits.* . . .

"(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

"(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend a Judgment shall be served not later than 10 days after entry of the judgment."

(4) "Rule 77. *District Courts and Clerks*

"(a) *District Courts Always Open.* . . .

"(b) *Trials and Hearings; Orders in Chambers.* . . .

"(c) *Clerk's Office and Orders by Clerk.* . . .

"(d) *Notice of Orders or Judgments.* Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Proccdure."

(5) "Rule 79. *Books and Records Kept by the Clerk and Entries Therein.*

"(a) *Civil Docket.* The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Court with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances,

orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

"(b) *Civil Judgments and Orders.* The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

"(c) *Indices; Calendars.* . . .

"(d) *Other Books and Records of the Clerk.* . . ."

STATEMENT

Petitioner Hallmark Industry was the plaintiff in a treble-damage antitrust action (No. 47044) which went to trial in April, 1970 before respondent, Honorable Robert F. Peckham, in the United States District Court for the Northern District of California. The real parties in interest herein are Reynolds Metals Company (hereinafter "Reynolds") and Stanray Pacific Corporation (herein-

after "Stanray") who were two of the defendants in that case.

After many years of pre-trial preparation and discovery, and a lengthy and extensive trial which lasted for more than two months, the jury, after six days of deliberation, on June 24, 1970, returned a verdict in favor of Hallmark and against Reynolds and Stanray in the amount of $211,800. (A copy of the verdict is set forth in Appendix "A" attached hereto.)

Immediately following the polling of the jury, the District Court ordered that "the verdict may be entered". (R.T. 3960, Appendix "B".)

It is clear that the immediate entry of the verdict on June 24, 1970 was intended by the Court to constitute the entry of judgment and the date upon which the 10 day period for filing of motions for judgment notwithstanding the verdict and new trial would begin to run; and the entry clearly had that effect, for the Court stated (R.T. 3964):

> "The judgment has been entered as of today. So, the 10 days will start running today. We will set it down for a hearing."

It is also clear that counsel for the defendants—real parties in interest—understood that the judgment was immediately entered on June 24, the date that the jury returned its verdict, by the colloquy between Mr. Hauser (counsel for Reynolds) and the Court. (R.T. 3961-3962.) Mr. Hauser repeatedly and explicitly recognized that his client had but ten days from June 24 to file its post-verdict motions. (R.T. 3961-2, 3966.) Moreover, Mr. Hauser conceded that the ten day period was a jurisdic-

tional limitation on the power of the Court. (R.T. 3966.) A hearing date of July 22, 1970 was then mentioned for arguments on any motions which were timely filed.

So that there would be no doubt, the Court then read into the record the text of Rule 50(b) of the Federal Rules of Civil Procedure which states that motions for judgment notwithstanding the verdict must be made "not later than 10 days after entry of judgment". (T. 3962.) The same strict time limitation applies under Rule 59(b) to motions for new trial.

Again, it is important to reiterate that Judge Peckham then stated that "the judgment has been entered *as of today. So the 10 days will start running today.*" (Emphasis added.)

The ten day period for the filing of the motions for judgment notwithstanding the verdict and new trial thus expired on Saturday, July 4, 1970. Reynolds and Stanray filed their motions on July 9, 1970 (see the docket entries as set forth in Appendix "C" attached hereto) *five days after the expiration* of the time limit.

In reading the Clerk's docket entries, it appears that the jury verdict was received, entered, and filed on June 24th. A separate notation stating the substance of the judgment was also entered immediately. Again, it is clear from the transcript that judgment was entered on that date. However, on June 29, 1970 the docket reflects an entry, "189. Entered Judgment . . . " which simply reiterates the text of the verdict and the separate notation previously entered on June 24, 1970.

Petitioner submits that this later action by the Court —on June 29, 1970—adds nothing of substance to its

previous action of June 24 with the possible exception of the word "judgment", which under the circumstances is clearly superfluous. The record here demonstrates that all requirements for determining the finality of judgments under Rule 58 of the Federal Rules of Civil Procedure were met and satisfied by the District Court's action on June 24, 1970: (1) judgment was pronounced and directed to be entered by the Court; (2) all of the parties received notice of the judgment and of the fact that the relevant time periods for post judgment relief had started to run; (3) the court manifested its intention—on the record—that judgment be entered as of that date and that no further act was required and nothing further was left open; (4) the jury verdict and the docket entry of June 24 were, themselves, complete on their face in resolving and adjudicating the rights and liabilites (including the amount of damages) as between all parties in the litigation; and (5) the judgment was set forth on a separate document—the verdict form itself—which the clerk forthwith prepared (by a handwritten notation thereon), signed and entered on June 24, 1970. Thus, the judgment became effective immediately.

The subsequent entry (on June 29) of another document designated "judgment" was superfluous and added nothing to the judgment previously entered. Accordingly, the motions filed by Reynolds and Stanray on July 9, 1970—at least five days after the expiration of the relevant time period—were untimely and should have been quashed. The District Court's order granting judgment notwithstanding the verdict or new trial based on such untimely motions is, therefore, void and must be vacated. (It should be noted that an appeal questioning the pro-

priety, on the merits, of the District Court's order granting judgment notwithstanding the verdict or new trial is presently pending before the United States Court of Appeals for the Ninth Circuit, Case No. 71-1492. A ruling in favor of petitioner herein on its present petition for a writ of certiorari would thus obviate the necessity of a complex and time consuming appeal and the prospect of a lengthy retrial before a jury, each of which will consume valuable judicial time in our already overburdened federal courts.

REASONS FOR GRANTING THE WRIT

I. THE ACTION OF THE COURT BELOW FRUSTRATES IMPORTANT POLICIES RELATING TO FINALITY OF JUDGMENTS IN FEDERAL COURTS, THE RIGHT TO TRIAL BY JURY, AND UTILIZATION OF THE CIVIL TREBLE-DAMAGE REMEDY AS A MEANS OF VIGOROUSLY ENFORCING NATIONAL ANTITRUST POLICY.

This Court has spoken quite harshly, and properly so, of the use of summary procedures by District Judges to dispose of civil antitrust claims under Section 4 of the Clayton Act (15 U.S.C. §15). *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500-505 (1969); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 703-704 (1969); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

The essence of these rulings is that, in appraising the anticompetitive nature of business practices and the existence of illegal conspiratorial behavior, the expertise of the jury is indispensable. As this Court stated in *Poller, supra* (368 U.S. at 473):

> "We believe that summary procedures should be used sparingly in *complex, antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators,* and hostile witnesses thicken the plot. It is only when the *witnesses are present and subject to cross-examination that their credibility* and the weight to be given their testimony can be appraised. *Trial by affidavit is no substitute for trial by jury* which so long has been the hallmark of 'even handed justice'." (Emphasis added.)

It would seem that the sound policy which underlies this often repreated language is even more significantly frustrated in a case such as our present one where the jury's appraisal of the conspirators' "motive and intent" as well as the credibility of "hostile witnesses" is disregarded by the District Judge's grant of judgment notwithstanding the verdict. Do the cases cited above prevent summary disposition of antitrust claims at the pretrial phase of the litigation and yet permit a trial judge to accomplish the same result after the jury has dutifully performed their arduous but, under the circumstnces, useless and futile task? Is the right to trial by jury in antitrust cases so unimportant? [See *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).]

It is true that grants of judgment notwithstanding the verdict are allowed under the Federal Rules of Civil Procedure; but summary judgments are likewise permitted. The importance of cases such as *Poller, Fortner Enterprises* and *Norfolk Monument* (all *supra)* is that—in civil antitrust cases—these summary procedures which effectively pre-empt the function of the jury are disfavored.

In this light, it seems clear that the availability of judgments notwithstanding the verdict under Rule 50(b) must be restricted. Rule 50(b), therefore, must be narrowly and strictly construed, particularly with respect to the ten (10) day limitation period for the filing of such motions seeking to overturn the jury's verdict.

Inasmuch as the grant of judgment notwithstanding the verdict is in derogation of the right to trial by jury, important federal constitutional and procedural policies require that this Court establish strict ground rules for parties, such as Reynolds and Stanray herein, who seek to vitiate the jury's determination. This alone would warrant the granting of Hallmark's petition for a writ of certiorari here.

In our present case, the jury—after approximately eight weeks of trial and six days of deliberation—returned a verdict in favor of petitioner Hallmark on June 24, 1970. The District Court immediately, and in open Court with all counsel present, ordered that judgment be entered. The Clerk immediately made an appropriate notation on the verdict form (Appendix A), and signed it. All parties were present (i.e., represented by counsel) and received full and unequivocal notice of the immediate entry of judgment. Even so, to make its action crystal clear, the trial judge read Rule 50(b) *verbatim* to counsel for Reynolds and Stanray, and then stated:

> "The judgment has been entered as of today. So the 10 days will start running today." (R.T. 3964.)

The meaning and effect of the above acts and words are clear. Judgment was entered. The jury verdict form was the judgment. The Clerk then immediately filed that

document and made the two appropriate entries in the civil docket, one of which was a detailed and complete entry of the terms and substance of the judgment. (Appendix D.) Only the word "judgment" was omitted.

Thus, if under Rule 50(b), the ten (10) day time limit for filing motions started running as of June 24, 1970, how could the District Court properly entertain and act upon a motion filed fifteen (15) days later—July 9, 1970?

The courts below determined that, notwithstanding the complete and unequivocal entry of judgment on June 24, 1970, the period for filing motions under Rules 50(b) and 59 did not begin to run until June 29, 1970 when a document designated "Judgment" (Appendix C) was filed. Under the facts of our case, this was clearly erroneous by virtue of this Court's prior opinion in *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 233 (1958):

> "And as correctly held by the Court of Appeals, *the later filing and entry of a more formal judgment could not constitute a second final judgment* in the case nor extend the time of appeal." (Emphasis added.)

The decisions of the courts below in our case thus raise important issues dealing with the finality of federal judgments. They liberalize the availability of relief under Rules 50(b) and 59, even though such relief is necessarily in derogation of the right to trial by jury as articulated in the Seventh Amendment to the Constitution of the United States. Finally, the decisions below ignore this Court's definition of final judgment as stated in the *Schaefer Brewing* case. As Mr. Justice Harlan

stated in his dissenting opinion in that case (356 U.S. at 251):

> "The Court's opinion, and the dissent of Mr. Justice Frankfurter which I have joined, are at one on the basic issue, namely, *that entry of a formal judgment is not necessary to start the time for appeal running,* and also agree that the determinative question in any given case is whether the District Court intended its decision on the merits to be a final disposition of the matter." (Emphasis added.)

Therefore, this Court should grant Hallmark's present petition for a writ of certiorari in order to settle—once and for all—these important questions relating to the finality of judgments in federal litigation, particularly in cases such as ours, where the lower courts' disregard for that finality was in derogation of the right to trial by jury. The uniform, strict rule here applicable—if reaffirmed by this Court—would go far toward avoidance of the prolongation and "endless" nature of complex federal litigation by discouraging appeals, duplicative trials, and the like.

II. THE UNTIMELY FILING BY DEFENDANTS BELOW OF THEIR MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL MAY NOT BE EXCUSED AND PRECLUDES THE GRANTING OF SUCH RELIEF UNDER RULES 50(b) AND 59.

In *Weir v. United States,* 339 F.2d 82, 83 (8th Cir. 1964) the Court stated:

> "If a motion for new trial is not served within the time prescribed by Rule 59(b) supra, it is too late and cannot be granted by the District Court. Cf. Chicago & N.W. Ry. Co. v. Britten, 301 F. 2d

400 (8 Cir. 1962). A District Court is powerless to enlarge the period of time required for the service of such a motion. Nugent v. Yellow Cab Co., 295 F.2d 794 (7 Cir. 1961); Federal Deposit Ins. Corp., etc. v. Alker, et al., 234 F.2d 113 (3 Cir. 1956)."

Similarly, the ten day period for motions for judgment notwithstanding the verdict under Rule 50(b) is jurisdictional. Failure to file such motions on time precludes the granting of the relief sought. *Hulson v. Atchison, T. & S.F. Ry. Co., infra.* Under these rulings, there is no power or discretion in the District Court to enlarge the time allowed or to permit a waiver of the strict ten-day time limit. Nor may relief be permitted under Rules 6 or 60(b).

As the court stated in *Draper v. Erie Ry. Co.,* 183 F.Supp. 899 (W.D. Pa. 1960), the ten day period " . . . is mandatory and leaves no discretion with the trial judge." [Citing *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212 (1947)]

As suggested above, this strict approach is necessary because the relief sought under such motions, if granted, would necessarily prolong litigation and encourage duplicative trials, which here would be in derogation of a jury verdict rendered after a lengthy and complex trial. Courts must be very strict in holding parties to the express and specific time limitations which apply to Rules 50(b) and 59. Therefore, this Court should grant review here to reaffirm this clear federal policy.

III. THE RULING BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS IN CONFLICT WITH DECISONS BY COURTS OF APPEAL IN OTHER CIRCUITS CONCERNING THE FINALITY OF JUDGMENTS IN FEDERAL LITIGATION.

In *United States v. F. & M. Schafer Brewing Co.*, 356 U.S. 227 (1958) this Court made it clear that a judgment may be final for all purposes even prior to the entry of a formal document designated "judgment". Moreover, if the judgment is already final, the subsequent entry of such a formal "judgment" document is ineffectual. It cannot constitute a second judgment in the same case, nor will it extend the time-period limitations relevant to post-judgment motions. (356 U.S. at 233, 251).

This view has been followed by Courts of Appeal in numerous circuits. *Weedon v. Gaden*, 419 F.2d 303, 306-307 (D.C. Cir. 1969); *Weir v. United States*, 339 F.2d 82, 83 (8th Cir. 1965); *United States v. Evans*, 365 F.2d 95 (10th Cir. 1966); *Alloyd General Corp. v. Building Leasing Corp.*, 361 F.2d 359, 362 (1st Cir. 1966); *Erstling v. Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958). In all of these decisions, including *Schaefer Brewing* the finality of the judgment was dependent, not on the filing of a document designated "judgment", but rather on whether the District Court and the parties intended and understood that the action taken constituted a final judgment.

A. The Record Clearly Indicates that all Parties Herein, Including the Court, the Clerk and Opposing Counsel, Intended and Understood that Judgment was to be Entered on June 24, 1970, the Date the Jury Returned its Verdict; And the Filing of the Verdict and the Entry in the Civil Docket on that Date was a Full and Complete Entry of Judgment, with Notice to All Counsel.

The facts in our present case, as established by the clear language and the colloquy between Judge Peckham, his clerk and opposing counsel, *on the record* on June 24, 1970 leaves no doubt that all parties and participants concerned recognized that on June 24th—the date the jury returned its verdict in favor of petitioner—the Court pronounced judgment, and that such judgment was immediately entered. The Court then stated: "The judgment *has been entered* as of today. So the 10 days [for filing motions notwithstanding the verdict and for new trial] will start running today." (R.T. 3964). (Emphasis added.)

The situation could not have been made more clear. The acceptance of the verdict and the direction by the Court to the clerk to enter same was itself tantamount to a direction to enter judgment. But so that there would be no misake the Court read Federal Rule of Civil Procedure 50(b) *verbatim,* emphasized the ten (10) day period and then specifically repeated that judgment had been entered as of that date (June 24) and that the ten days allowed to counsel for defendants for making post-judgment motions under Rules 50(b) and 59(b) " . . . will start running today."

Moreover, counsel for Reynolds and Stanray clearly indicated, *on the record,* their understanding of this situation. One of the attorneys (Mr. Hauser for Reynolds) stated (R.T. 3966):

> " . . . We do have to file our motions within the 10 day period. That seems to be more or less jurisdictional."

Then, the parties and the Court discussed an appropriate date for hearing any motions which could be timely filed within the next 10 days. No amount of extra-record explanation or protestation can contradict the clear meaning of the June 24th colloquy or the clear understanding of all concerned that judgment had been entered on the verdict and the 10 day period allowed for motions under Rules 50(b) and 59 had started to run as of June 24.

Given the above, Federal Rule of Civil Procedure 58 requires "[u]nless the Court otherwise directs . . . *judgment upon the verdict of a jury shall be entered forthwith by the clerk . . .* " (Emphasis added.) That is precisely what occurred when, on the same day, June 24th, the clerk made an appropriate notation on the verdict form, then signed and entered it; the clerk then also entered the substance of the verdict (which was the "judgment" for our purposes) in the civil docket by the following entry:

> "Jun 24 187 . . . Trial resumed, fur. deliberations by jury; jury returned verdict, that a conspiracy or combination existed among or between the following defendants: Reynolds Metals Company, Yes; Harvey Aluminum Company, No; Stanray Pacific Corporation, Yes; in favor of the pltff. and against the designated defts. and asses. damages in the amount of $211,800.00; Ord. case cont'd. to July 22, 1970, 10 A. M. for hearing on all motions. (Peckham)
>
> 24 188 Filed jury verdict."[1]

[1]The so-called "judgment" filed on June 29, 1970 was little more than a *verbatim* repetition of the June 24th entry. It added nothing of substance:

Indeed, cases have ruled that the clerk is dutybound to enter the judgment announced, as directed by the court, as soon as possible and practical. Compare: *Klein v. Nu-way Shoe Co.*, 136 F.2d 986, 989 (2nd Cir. 1943). In this light it seems clear that the two docket entries on June 24, 1970—one filing the jury verdict, the other fully setting out the terms of that verdict—were filed by the clerk in accordance with his duty to enter "judgment upon the verdict . . . forthwith . . . . "

In response, Reynolds and Stanray in the courts below, cited cases such as *Danzig v. Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3rd Cir. 1960) which seems to require entry of a "formal" judgment, so designated. In making this argument, defendants miss the point of the numerous relevant cases decided on this question.

In *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), an initial entry of an order of the trial court was not recognized as the "final judgment" because it was found that: (1) the Court did not intend its order as the final judgment; and (2) the docket entry was not sufficiently complete in itself to give adequate notice and provide full information from which the judgment of the Court and the nature of the relief, i.e., amount of damages, could be determined. Compare: *United States v. Evans*, 365 F.2d 95 (10th Cir. 1966).

"Jun 29 189 Entered Judgment filed June 29-70 that "We the members of the jury in the above entitled action find that a conspiracy or combination existed among or between the following Deft's: REYNOLDS METALS CO. Yes, HARVEY ALUMINUM CO. No, and STANRAY PACIFIC CORP. Yes.
We find in favor of the Pltff and against the designated Deft's and assess damages in the amount of $211,800.00 Jack M. Noe Foreman"

But where, as in our case, all parties have clear and explicit notice that final judgment has been entered (Again refer to the language of Judge Peckham and his colloquy with defense counsel) and the earliest docket entry reflects the full and complete information necessary to determine the substance of the action by the Court, that entry is the entry of a final judgment. *Nichols-Morris Corp. v. Morris,* 272 F.2d 586 (2nd Cir. 1959); *Erstling v. Southern Bell Tel. & Tel. Co.,* 255 F.2d 93 (5th Cir. 1958); *Liberty Mutual Ins. Co. v. Pillsbury,* 155 F.2d 820 (9th Cir. 1946).

As the *Erstling* case makes clear, where the first entry is complete, and the second entry adds little or nothing of substance (other than the word "judgment"), the first is the entry of judgment. 255 F.2d at p. 95.

In our case, the entry of June 24, 1970 was complete in stating the terms of the jury verdict and the nature of the relief and amount of damages awarded. The June 29, 1970 entry was designated "judgment" but added nothing further; it simply repeated the terms of the verdict already filed and stated The cases clearly indicate that the June 24 entry was the entry of judgment. *Napier v. Delaware, L. & W. Ry. Co.,* 223 F.2d 28 (2nd Cir. 1955).

The subsequent entry of a "formal judgment" was duplicative, unimportant and of no effect. *Woods v. Nicholas,* 163 F.2d 615 (10th Cir. 1947). As Mr. Justice Harlan stated, dissenting in the *Schaefer Brewing* case, *supra* (356 U.S. at p. 251):

> "The Court's opinion, and the dissent of Mr. Justice Frankfurter which I have joined, are at one on the basic issue, namely, that entry of a formal judgment

> is not necessary to start the time for appeal running, and also agree that the determinative question in any given case is whether the District Court intended its decision on the merits to be a final disposition of the matter."

Indeed, in the *Danzig* case itself, so heavily relied upon by defendants below, the court refused to recognize the entry of a verdict as tantamount to the entry of judgment only because of the ambiguous nature of the first entry. In *Danzig,* the Court noted that opposing counsel had no notice or reason to believe that the entry of the verdict would be characterized as an entry of judgment. 278 F.2d at p. 582. On the other hand, in our case, the clear language of Judge Peckham on June 24, in open court, indicated that judgment was entered on the verdict that day. Opposing counsel clearly acknowledged their understanding of that fact and that the ten day period for seeking relief under Rules 50(b) and 59 would start running immediately.

In our present case, the courts below ignored the sound reasoning and the strong public policy behind this Court's view of finality of judgment. As such, a clear conflict has developed on this issue as between the Ninth Circuit and the other Courts of Appeal which have considered the issue of finality of judgments in federal litigation. In the face of facts as clear as those in our present case, only the Ninth Circuit has ignored this Court's mandate by requiring the entry of a formal document designated "judgment" as a condition to finality.

Therefore the petition for writ of certiorari here sought by Hallmark must be granted. Immediate review by this Court is the only plain, speedy and adequate

remedy available to petitioner. If such relief is denied, a major appeal involving numerous procedural and substantive issues in this antitrust litigation will be necessary. Such will require the expenditure of extensive time and resources by the parties and their attorneys herein as well as by various lower federal courts, involving an analysis of a lengthy record on appeal, preparation and analysis of legal briefs and oral argumentation, and ultimately, perhaps a re-trial on the merits. Such an endless prolongation of this litigation is contrary to modern efforts to promote efficiency in the administration of justice. Moreover, when such an unjustified prolongation occurs in the area of antitrust litigation, the important public interest in the enforcement of national antitrust policy is frustrated and impeded. On the other hand, the issue presented in this petition is a relatively clear and simple one which, if resolved in favor of petitioner, as is required by the controlling law here applicable, would put an end to this litigation.

B. Rule 58 of the Federal Rules of Civil Procedure Does Not Require the Filing or Entry of Separate Document Designated "Judgment" as a Condition for Finality.

The courts below erroneously followed the view put forth by Reynolds and Stanray that Rule 58 requires the preparation, signing and entry of a separate document designated judgment before a final judgment is effective. In this respect, Rule 58 provides in relevant part:

> "Rule 58. *Entry of Judgment.* Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, *the clerk* unless the

> court otherwise orders, *shall forwith prepare, sign, and enter the judgment without awaiting any direction by the court.* . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). *Entry of the judgment shall not be delayed for the taxing of costs.* Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." (Emphasis added.)

Professor Moore points out that this provision was meant to " . . . encourage all reasonable speed in formulating and entering the judgment when the case has been decided." 6 A Moore's Federal Practice, 1969 Cum. Supplement, ¶58.01, p. 41. Our case was decided on June 24, not June 29.

Reynolds and Stanray argued below, and the courts so held, that Rule 58 not only requires a judgment " . . . set forth on a separate document . . . ", but also requires the separate document to be designated "judgment". In our case, the District Court ordered judgment to be entered immediately. The Clerk then made an appropriate notation on the verdict form, signed, entered, and filed this separate form "forthwith", as he was required to do by Rule 58, "without awaiting any [further] direction by the court".

Despite the federal procedural policy favoring the speedy entry of judgment, and in disregard of the language of the District Judge that "the judgment has been entered as of today [s]o the 10 day period will start running today", the courts below ruled that the entry

of judgment was delayed for five days until the entry of another document formally designated "judgment".

In so ruling, the courts below also overlooked the effect of relevant portions of Rule 79(a) as applied to entry of judgments.

> "Rule 79. *Books and Records Kept by the Clerk and Entries Therein.*
>
> (a) *Civil Docket.* The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed . . . . All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. *These entries shall be brief but shall show the nature* of each paper filed or writ issued *and the substance of each order or judgment of the court* and of the returns showing execution of process. The entry of an order or judgment shall show the date the notation is made." (Emphasis added.)

In this respect, in our present case, when the jury returned its verdict, the District Court immediately announced the judgment and ordered it to be entered by the Clerk as of that date, June 24, 1970. The Clerk made an appropriate notation and immediately made the following entry in the civil docket on the very same day:

> "Jun 24/ Trial resumed, fur. deliberations by jury; jury returned verdict that a conspiracy or combination existed among or between the following defendants: Reynolds Metals Company, Yes; Harvey Aluminum Company, No; Stanray Pacific Corporation, Yes; in favor of the pltff. and against the

> designated defts. and assess damages in the amount of $211,800.00; Ord. case cont'd to July 22, 1970, 10 A.M. for hearing on all motions (Peckham)
>
> 24/ . . . Filed jury verdict."

This entry says it all. It completely states the judgment of the Court which was pronounced and entered upon the jury verdict. It designates the rights and liabilities of all parties involved in the case, then sets a hearing date on motions which were to be filed within ten days.

> "Purpose of entry in civil docket is primarily to indicate to the parties that an act dispositive of the case has been taken and to set a definite time for beginning of running of time . . . . " *Nichols-Morris Corp. v. Morris,* 272 F.2d 586, 588 (2d Cir. 1959).

In the *Nichols-Morris case,* the Court held that the entry in the civil docket that plaintiff recover the sum of $23,500 was sufficient to satisfy requirements of the rules as to entry and was effective to begin the running of time. In our present case, the additional factors of the nature of the case as well as the naming of the defendants involved are also specified. The embodiment of the notation of June 24 (especially when viewed together with the recorded proceedings on June 24) leaves no doubt that the Clerk entered judgment on that date.

The June 29th notation added nothing of substance to the notation of June 24th other than the word "judgment". The applicable law is clear that no importance may be placed on mere semantics or form. No special terminology, not even the word "judgment", is necessary in order to constitute a final judgment. The Clerk's failure

to write the word "judgment" on the verdict form or the civil docket entry for that date cannot be decisive or present an effective entry of final judgment. As this Court has ruled:

> " . . . this Court has held that "[n]o form of words and no peculiar formal act is necessary to evince [the] rendition [of a judgment]." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232 (1958).

In a case strikingly similar to the case at bar, a court has held that the later filing of a more formal judgment could not constitute a second final judgment in the case nor extend the time. *Erstling v. Southern Bell Telephone & Telegraph Co.*, 225 F.2d 93 (5th Cir. 1958). In *Erstling*, the Court entered the following order:

> "Ordered and Adjudged that the Plaintiff's Complaint be and is hereby dismissed. The plaintiff declining to plead further, this order is made with *prejudice to the Plaintiff.*"

The order was dated July 11. The civil docket bore the entry "1957 . . . July 12 order granting motion to dismiss with prejudice to Pltf." On July 25 an instrument styled "Final Judgment" was signed by the district judge. It provided:

> "Ordered and Adjudged that the plaintiff Telephone and Telegraph Company, go hence without delay and recover its costs to be taxed by the clerk of this Court."

The Fifth Circuit found:

> "If the language used by the court clearly evinces the judge's intention that it shall be his final act it

> constitutes a final judgment, and when such intention has been so evidenced and the docket entry has been made a final judgment has been pronounced and entered and the time to appeal starts to run. *The later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal.*
>
> "In the case before us one of the instruments is styled 'Order' and the other is called 'Judgment'. But as has been noted, the label is unimportant. 255 F.2d, p. 95 (Emphasis added.)

So also in our present case, the judgment was final and the ten day period for the filing of post-trial motions started running as of June 24. (T. 3964). "The later filing and *entry of a more formal judgment* could not constitute a second judgment . . . nor extend the time . . . ."

The decision in *Erstling* was, and the ruling of this Court in our present case should be predicated upon the language in the *Schaefer Brewing Co.* case, *supra.*[2]

---

[2]In *Schaefer Brewing,* the trial court ruled that the first entry was effective as establishing entry of final judgment. This Court reversed only because

> "The actions of all concerned—of the judge in not stating in his opinion the amount, or, means for determining the amount, of the judgment; of the clerk in not stating the amount of the judgment in his notation on the civil docket; . . ." 356 U.S. at p. 235.

That situation is not present in our case because of the nature of the June 24th entry which not only states the action taken by the jury, but also the precise amount of the verdict. And, of course, Section 4 of the Clayton Act providing automatic trebling provides the amount and "means for determining the amount" of the judgment. Moreover, it is important to note that the June 29th entry is substantially identical to and duplicative of the June 24th entry.

As this Court stated in *Schaefer Brewing*, the first consideration is "whether the judge has or has not clearly declared his intention." In our present case, the District Court's declaration and colloquy with counsel (set forth above) makes it clear that the Court intended for judgment to be entered immediately upon the return of the jury's verdict. And the opposing counsel understood and acknowledged this. If so, then, the question is whether the clerk forthwith entered "a brief notation of the judgment in the civil docket [showing the substance of the judgment of the court.]" 356 U.S. at p. 233: Again the Supreme Court's opinion in *Schaefer Brewing* is relevant:

> "When . . . these elements clearly appear final judgment has been both pronounced and entered, and time to appeal starts to run . . . . *And as correctly held by the Court of Appeals, the later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time of appeal.*" 356 U.S. at p. 233. (Emphasis added.)

Therefore, it is clear that Rule 58 does not require the entry of a separate document designated "judgment" as a condition for the finality of judgment. In *Weedon v. Gaden, supra*, the District of Columbia Circuit considered this issue concerning the date of the entry of judgment under Rule 58 *as amended*. The Court recognized that a final judgment may be a judgment even though not designated as such; the Court criticized litigants for

> " . . . failure to distinguish sharply between three concepts which mark normal stages in the evolution of a civil judgment. We use the latter term because

the order of November 17, 1967, was a judgment in the full sense of the word. A judgment must first be rendered, that is, *the court's adjudication must be pronounced. This enunciation of the judgment may be either written or oral;* if pronounced orally, the judgment is usually committed to writing later. Customarily, the written document is then filed by delivery to the clerk for custodial purposes. Lastly, the judgment is entered by a notation in the civil docket. Rendition of judgment, the judicial act, is of course for the court; its filing and entry are ministerial activities to be handled by the clerk.

Rule 58 of the Federal Rules of Civil Procedure in relevant part provides that "upon a decision by court that . . . all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court." The order of November 17, 1967, totally denied appellants' motion to vacate the default judgment. Thus we do not perceive more than a faithful performance of the duties commanded by Rule 58 in the bare circumstance that the filed order of November 17, 1967, was ostensibly prepared and concededly signed by the clerk.

* * *

To put the present problem in proper perspective, we briefly recapitulate the salient events. The order of November 17, 1967, denied appellants' motion to vacate the default judgment, thus evidencing the District Court's resolution of the issues raised by the motion. *That order is devoid of any suggestion that anything in regard to its subject matter was left open for future determination and so, as we have already indicated, it was clearly final and appealable."* 419 F.2d at pp. 305-306. (Emphasis added.)

Comparing our case to *Weedon,* Judge Peckham's oral statement entering judgment on the verdict on June 24 was a clear rendition and pronouncement of judgment. The verdict was then given to the clerk for filing. The clerk made a notation on the form, then signed and entered it in the civil docket on the same date. The filing and docket entry of the verdict and statement of the substance thereof on June 24 was the "entry of judgment" in our case. As in *Weedon,* the failure to use the word "judgment" in the docket entry was irrelevant. Compare the decision of this Court in *Jung v. K. & D. Mining Co.,* 356 U.S. 335, 337 (1958).

In our case, as in *Weedon,* there was an absence of mailed written notice of the judgment. The *Weedon* Court ruled:

> ". . . we have not overlooked the fact that appellants' counsel did not receive notice of the entry of that order, and did not find out about it until it was too late to file a timely notice of appeal. That unfortunate circumstance cannot be attributed to appellee, for while had he known of the order, he might have served a notice of its entry, he was under no compulsion to do so, moreover, appellee's counsel did not get notice either. And while Rule 77(d) requires the court '[i]mmediately upon the entry of an order or judgment' to 'serve a notice of the entry by mail . . . upon each party who is not in default for failure to appear,' that provision cannot avail appellants. The Rule explicitly provides that '[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed . . . ,' and the history of that provision

demonstrates that it was precisely an instance of the type presented in this case that the provision was designed to govern. As the Advisory Committee to the Rules took pains to make clear more than two decades ago:

> Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal. . . . It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment." 419 F.2d at pp. 307-308.

Our case is even stronger than the situation in *Weedon*. Unlike the circumstances in *Weedon*, the defendants in our case did have full notice of the entry of judgment in open court on June 24, 1970. Indeed, they were expressly informed that their ten day time limit for filing motions under Rules 50(b) and 59 began to run on that date. They further acknowledged their understanding of this situation *on the record*, and recognized that the ten-day period was jurisdictional. Their failure to file until fifteen days later clearly precludes the granting of relief under either Rule.

Most of the cases discussed above involved the issue of whether a judgment had been entered for purposes of determining the timeliness of a notice of appeal. How-

ever, in decisions concerning the finality of judgment in calculating the ten day period for motions under Rules 50(b) and 59(b), courts have been even more explicit in regarding the verdict and the judgment as synonymous. Perhaps this view is prompted by the recognition that such motions are made in derogation of a jury verdict and, to some extent, detract from the right to a trial by jury. See, for example, *Hulson v. Atchison, T & SF Ry. Co.*, 289 F 2d 726 (3rd Cir. 1961) *cert. denied* 368 U.S. 835 where it was ruled that a District Court may not enter judgment notwithstanding the verdict under Rule 50(b) if the motion for that relief is not made within ten days after reception of the verdict. 289 F.2d at p. 729.

Similarly in *Nugent v. Yellow Cab Co.*, 295 F.2d 794 (3rd Cir. 1961) *cert. denied* 369 U.S. 828 the reception of the verdict was equated with entry of final judgment. Motions for judgment notwithstanding the verdict and for new trial (pursuant to Rules 50(b) and 59), the Court stated, must be rejected if filed more than 10 days after the reception of the verdict. While the language of Rule 50(b) has been amended so as to require entry of judgment in order to start the running of the ten day period, there is good reason in jury cases to regard the reception and filing of the jury verdict as the rendition and entry of judgment, especially in a case such as ours where the record is replete with evidence that the court, the clerk and all opposing counsel knew and understood that judgment had been immediately entered on the verdict.

Therefore, the five requirements for determining the finality of judgment under Rule 58, as amended, were

thus met on June 24, 1970: (1) judgment was rendered and directed to be entered by the Court; (2) all of the parties received notice of the judgment and of the fact that the relevant time periods for post judgment relief had started to run; (3) the court manifested its intention—on the record—that judgment was entered and that no further act was required and nothing further was left open; (4) the jury verdict and the docket entry of June 24 were, themselves, complete in defining the rights and liabilities (including the amount of damages) as between all parties in the litigation; and (5) the judgment was set forth on a separate document—the verdict form itself —which became effective when that document was dated, signed, entered, and filed by the Clerk on June 24, 1970.

The failure of the courts below to recognize the finality of the June 24, 1970 entry of judgment herein thus raises significant problems regarding important aspects of federal procedure. The decision of the Ninth Circuit is not only in derogation of the right to trial by jury, but is also one which will necessarily prolong this protracted litigation. The ruling below is inconsistent with the decisions of this Court, and in conflict with decisions of other Circuits concerning the finality of judgments in federal litigation.

CONCLUSION

For all of the foregoing reasons, Hallmark's Petition for Writ of Certiorari should be granted.

Dated, May 5, 1971.

Respectfully submitted,
LAW OFFICES OF JOSEPH L. ALIOTO,
PETER J. DONNICI,
JOSEPH M. ALIOTO,
LAWRENCE J. APPEL,
By PETER J. DONNICI,
Counsel for Petitioner.

(Appendices Follow)

Appendix "A"

No. C-47,044 RFP

Hallmark Industry,
Plaintiff,
vs.
Reynolds Metals Company, et al.,
Defendants.

VERDICT

We the members of the jury in the above entitled action find that a conspiracy or combination existed among or between the following defendants:

Reynolds Metals Company	/s/ yes
Harvey Aluminum Company	/s/ no
Stanray Pacific Corporation	/s/ yes

We find in favor of the plaintiff and against the designated defendants and assess damages in the amount of $211,800.00.

/s/ Jack M. Noe,
Foreman.

Rec. 5:06 p.m.

Filed, Wednesday, June 24, 1970.
C. C. Evensen, Clerk,
R. Rainey, Deputy Clerk.

Appendix "B"

Volume 31, Pages 3957 through 3967
The United States District Court
Northern District of California
Before: Hon. Robert F. Peckham, Judge

No. 47,044

Hallmark Industry,
Plaintiff,
vs.
Reynolds Metals Co., Harvey Aluminum, Inc., and Stanray Pacific Co.,
Defendants.

REPORTER'S TRANSCRIPT
June 24, 1970

3958

Appearances:
For Plaintiff:
Joseph M. Alioto, Esq.
Gary W. Hoecker, Esq.
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San Francisco, California 94104

For Defendant Harvey:
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For Defendant Stanray:
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Michael J. Shockro, Esq.
Latham & Watkins
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Los Angeles, California 90017

For Defendant Reynolds:
John M. Hauser, Esq.
James L. Hunt, Esq.
McCutchen, Doyle, Brown & Enersen
601 California Street
San Francisco, California 94108

3959

June 24, 1970

(The following proceedings were had outside the presence of the jury.)

The Court: I have a note from the jury. It states:

"4:55 p.m., June 24, 1970. Your Honor, we have reached a decision in this case. Jack M. Noe, Foreman."

Will you kindly bring the jury in.

(Whereupon the jury assembled in the jury box at 5:03 p.m.)

The Court: May the record show the ladies and gentlemen of the jury are present.

Mr. Foreman, I received your note indicating that you have reached a decision in this case and signed by you.

The Foreman: Yes, sir, that's right.

The Court: Do you have the envelope?

The Foreman: Yes, sir.

The Court: Will you hand it to the Clerk, who in turn will hand it to me.

Will you read the verdict.

(Whereupon the verdict was read by the Clerk of the Court.)

The Court: Would you like the jury polled?

Mr. Hauser: Yes, Your Honor, we would like to have

the jury polled.

The Court: All right. Mr. Clerk, will you poll the jury. Ladies and gentlemen, as your name is called will you state: "This is my verdict," if you voted for it; "this is not my verdict," if you do not agree with it and it is not your verdict.

(Whereupon the Clerk polled the jury.)

The Clerk: The verdict is unanimous.

The Court: The verdict may be entered.

Mr. Alioto: We would move the Court, pursuant to Section 4 of the Clayton Act, that the judgment be trebled and judgment entered thereto.

The Court: The matter will be referred to subsequently.

Ladies and gentlemen, this concludes a long trial. I know how difficult it has been for you and how conscientious you have been, and what a very monumental

effort you have made to resolve the issues that have been presented to you.

I know that you have been a long time in deliberations. You have listened to me extensively on two occasions reading instructions. You have heard argument and you have heard evidence, and you don't want to hear a speech at the conclusion.

For that reason I am not going to extend these remarks, but I do extend to you my appreciation as one of the Judges of the United States District Court for your contribution to the administration of these Courts.

3961

And without saying more, I say goodby to you. I know it has been an experience that you will long remember.

Thank you very much, ladies and gentlemen.

The Foreman: Your Honor, I would just like to say on behalf of the jury that we have enjoyed—not enjoyed necessarily, but we have—know what our duties are, and everyone has done a very good job.

I want to express my thanks to the Court and to the jurors also for being so nice and everything. Thank you.

The Court: Thank you, Mr. Noe. Thank you, ladies and gentlemen, you are excused.

(Whereupon the jury was dismissed.)

The Court: May the record show that the ladies and gentlemen of the jury have departed and have been discharged.

The Court has before it now certain motions. I take it that within 10 days additional motions will be made.

Mr. Hauser: Yes, Your Honor. One other thing. I ordinarily, at least in my experience such as it has been,

that a Court has afforded the opportunity to the parties to make any objections they may have to the jury coming in and rendering their verdict.

We did not, therefore, have an opportunity to renew and press upon Your Honor our motion for mistrial; and we therefore, although it is certainly belated, we do urge that upon Your Honor. Of course, we do have the 10 day period

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within which to file certain motions addressed to the Court.

Mr. Alioto: May we also, Your Honor—I don't know whether I was out of order, sir, when I did that before judgment was entered. I apologize if I was out of order. I just don't know.

The Court: I didn't send it.

Mr. Alioto: Could we also set a hearing date on costs and attorneys' fees, too, if it please the Court, pursuant to Section 4 of the Clayton Act.

The Court: We might as well set down now a date for hearing on the various motions.

I think we ought to take an inventory of what is before the Court and what will be before the Court.

Motion for directed verdict was deferred. I am now reading from rule 50(b), with which I know you are all very familiar.

> "Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the

motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered

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thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

"A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

"If a verdict was returned the Court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the Court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Then it goes on with conditional rules on granting of the motion.

Now, the defendants made motions for directed verdict. Those rulings were deferred; so that the submission to the jury was subject to the later ruling upon the motions as set forth in the rule.

The plaintiff's motion, as I recall, was also not ruled upon.

Mr. Alioto: No, sir, it was not.

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The Court: So it is in the same status.

Mr. Hauser: Your Honor, if I might interject there. The plaintiff's motion was made at the close of the plain-

tiff's case, and I am sure the record shows was not made again at the close of all the evidence; and therefore, I don't believe that that is in the same category.

The Court: That wouldn't, of course, be relevant to Mr. Hanson's client.

Mr. Alioto: No, Your Honor.

Are you speaking of my motion?

The Court: Yes.

Mr. Alioto: That was directed toward Mr. Hauser's client.

The Court: That's right, it was. So, that would be academic.

Then Mr. Alioto has made his motion for treble damages, attorneys' fees and costs.

You will file a motion for a new trial or in the alternative—and you will file supporting papers.

The judgment has been entered as of today. So, the 10 days will start running today. We will set it down for a hearing.

Mr. Alioto: Could we file our papers at the same time, Your Honor?

The Court: Or respond to them, I suppose.

Mr. Alioto: No. I mean, with respect to costs and attorneys' fees.

The Court: Yes.

The Clerk: Your Honor, the 10th day would fall on Saturday, July 4th.

The Court: Do you want to have the hearing the following week?

The Clerk: We will be in San Jose.

(Whereupon the Court and the Clerk discussed the Court's calendar.)

Mr. Hauser: Your Honor, might I suggest sometime during the week of the 21st of July. I have a number of other things to take care of.

The Court: Certainly. That's agreeable.

Mr. Hauser: Really, almost any day that we would be agreeable. I think there is some problem as far as Stanray is concerned since, as I am sure Your Honor is aware, Mr. Gillam is in the hospital having a very serious operation and, indeed, won't be available for sometime.

They will have to work out some way of handling it.

Mr. Shockro: Your Honor, in that regard, I would hope that shortly I will be able to consult with Mr. Gillam on this matter.

Perhaps setting a hearing for the week of the 21st would be the most convenient. If there are some serious

problems, we could adjust according to convenience.

The Court: All right. What are our outside time limitations would be—I suppose once the motion is made it does extend the time for filing other notices and all.

Mr. Hauser: I don't really think, Your Honor, that's a serious consideration. We do have to file our motions within the 10-day period. That seems to be more or less jurisdictional.

Then as to the time within—actually under the local rules, I suppose this would fall in the category of the usual motion. Ordinarily it is set for hearing 21 days after it is filed.

The Court: That's agreeable. The subsequent date is agreeable.

Mr. Alioto: May I have that date, please.

The Clerk: Your Honor, the suggested date is Wednesday, July 22nd at 10:00 o'clock.

The Court: That will be in this courtroom.

Mr. Shockro: One other matter. I would also like to move at this time for entry in favor of Stanray Pacific Corporation on the claim that Stanray unilaterally attempted to monopolize.

The Court: Pursuant to the directed verdict?

Mr. Shockro: Yes, Your Honor.

The Court: That will be the order.

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Anything further?

Mr. Alioto: No, sir.

The Court: All right.

Thank you, gentlemen.

(Whereupon the proceedings were adjourned.)

Appendix "C"

United States District Court
for the
Northern District of California

Civil Action File No. 47,044-RFP

Hallmark Industry,
vs.
Reynolds Metals Company, et al.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that "We the members of the jury in the above entitled action find that a conspiracy or combination existed among or between the following defendants:

Reynolds Metals Company	Yes
Harvey Aluminum Company	No
Stanray Pacific Corporation	Yes

We find in favor of the plaintiff and against the designated defendants and assess damages in the amount of $211,800.00

Jack M. Noe
Foreman"

Dated at San Francisco, California, this 29th day of June, 1970.

C. C. Evensen
Clerk of the Court

Filed June 29, 1970
C. C. Evensen
Clerk of the Court

Appendix "D"

Date	Proceedings
1970	

June 11—Further trial, evid. introd., ord. case cont'd. to June 15, 1970, 10 A.M. for further trial. (Peckham)

June 15—184 Filed Memorandum regarding Arguments to the Jury by Deft Stanray Pacific Corp.

June 15—Further trial resumed. evid. introd. Ordered that case cont to June 16-70 at 10 AM for further trial. Peckham

June 16—185 Filed motion to reconsider the admission of the Shrank Reportas & the Jarvis Memorandum by Pltff.

June 16—186 Filed Jury Instructions proposed by Deft's.

June 17—Trial resumed Pltff's evid. introd. Ordered further cont to June 18-70 at 9:15 a.m. (Pckham)

June 18—Trial resumed Court resumed its further instruction to the jury. The jury retired to deliberate upon its verdict on the evidence. Court ordered that the jury resumed its further deliberation on Friday June 19-70 at 9:30 A.M. Peckham

June 19—Further deliberation by the jury was resumed. The hour of adjournment having arriged, it is by the Court ordered that the further deliberation in this cause by the jury be cont. to Saturday June 20-70 at 9:30 A.M. (Peckham

June 20—Jury resumed further deliberation. Ordered that the further trial in this case be cont. to June 22-70 at 9:30 A.M. Peckham

June 22—Jury resumed further deliberation. Out of the presence of the jury. After hearing it is is by the Court Order Defense motion for Mistrial, submitted for consideration. Jury was instructed to return Tuesday June 23-70 at 9:30 A.M. for further deliberation in this case. Peckham

June 23—Jury resumed further deliberation. Jury separated & to return June 24-70 at 9:30 A.M. for further deliberations. Peckham

June 24—187 Filed Jury Instruction by Deft's.

June 24—Trial resumed, fur. deliberations by jury; jury returned verdict, that a conspiracy or combination existed among or between the following defendants: Reynolds Metals Company, Yes; Harvey Aluminum Company, No; Stanray Pacific Corporation, Yes; in favor of the pltff. and against the designated defts. and assess damages in the amount of $211,800.00; Ord. case con'td. to July 22, 1970, 10 A.M. for hearing on all motions. (Peckham)

June 24—188 Filed jury verdict.

June 29—189 Entered Judgment filed June 29-70 that "We the members of the jury in the above entitled action find that a conspiracy or combination existed among or between the following Deft's: Reynolds Metals Co., Yes; Harvey Aluminum Co., No; and Stanray Pacific Corp., Yes.

June 29—189 (Cont.) We find in favor of the Pltff and against the designat Deft's and assess damages in the amount of $211,800.00. Jack M. Noe, Foreman"

July 1—190 Filed Bill of Costs by Pltff to be taxed on July 7-70 at 10 A.M.

July 6—191 Filed memo bill of costs by deft. Harvey Aluminum against pltff. ($9,105.52)

July 7—192 Filed notice of motion by Deft Weyerhaeuser Co. & motion for Order impressing Lien on Cause of action & upon Judgment for July 22-70 at 10 A.M.

July 7—Lodge Order granting motion to impress Lien on Cause of action and upon Judgment.

July 9—192 Filed Motions of Deft's Reynolds Metals Co. & Stanray Pacific Corp. for Judgment Notwithstanding the Verdict & for a New Trial for July 22-70 at 10 A.M.

July 9—193 Filed Memorandum of Deft's Reynolds Metals Co. & Stanary Pacific Corp. in Opposition to Certain Costs in Pltff's Bill of Costs.

July 9—194 Filed Motion by Deft Stanray Pacific Corp. for Stay of execution pending Disposition of motions for Judgment Notwithstanding the Verdict & for a New Trial.

July 9—195 Filed Declaration of Mailing by Deft. Weyerhaeuser Co. of Affidavit in Support of Motion for Order Impressing Lein on Judgment, etc.

July 9—196 Filed Stip. & Order for judgment notwithstanding the verdict and for a New Trial, etc., continued to Sept. 8-70 at 10 A.M. Peckham

July 9—197 Filed Order granting motion for stay of execution pending Disposition of motions for New Trial & for Judgment Notwithstanding Verdict

(Peckham)

Appendix "E"

Law Offices of Joseph L. Alioto
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Joseph M. Alioto, Esq.
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San Francisco, California 94104
Telephone: [415] 434-2100
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California

No. 47,044

Hallmark Industry,
Plaintiff,
vs.
Reynolds Metals Company, et al.,
Defendants.

MOTION TO STRIKE DEFENDANTS' MOTIONS FOR JUDGMENT N.O.V. AND/OR NEW TRIAL

The plaintiff Hallmark Industry moves the Court to strike the defendants Stanray Pacific and Reynolds

Metals Company's motions for judgment N.O.V. and/or new trial.

Dated: July 20, 1970.

Law Offices of Joseph L. Alioto
Maxwell M. Blecher
Joseph M. Alioto
Gary W. Hoecker
/s/ By Maxwell M. Blecher

Appendix "F"

In the United States District Court
Northern District of California

No. 47,044 RFP

Hallmark Industry,
Plaintiff,
vs.
Reynolds Metals Company, et al.,
Defendants.

MEMORANDUM AND ORDER

This action was brought by plaintiff Hallmark Industry against defendants Reynolds Metals Company, Stanray Pacific Corporation and Harvey Aluminum, charging violation of Sections One and Two of the Sherman Act. 15 U.S.C. §§ 1, 2. The basic claim of the suit was that Stanray conspired with Reynolds and Harvey to prevent Hallmark from obtaining aluminum supplies necessary to Hallmark's successful competition for a prefabricated hut contract with the United States government.

The case was tried before a jury, and after lengthy deliberation, the jury returned a verdict against defendants Reynolds and Stanray in the amount of $211,800, an amount which, if it stands, will result in a judgment in favor of plaintiff for $635,400, plus an attorney's fee.

Following the jury's verdict, defendants Reynolds and Stanray moved this Court, pursuant to Fed. Rules Civ. Proc. 50(b) and 59, to enter a judgment for defendants notwithstanding the verdict, and, in the alternative, for a new trial. The parties were given ample time to file briefs on the motions, and extensive written and oral arguments were presented to this Court.

Having given this matter lengthy consideration, this Court finds that defendants' motion for a judgment notwithstanding the verdict should be granted on three independent grounds.

I. A Conspiracy Was Not Proven.

The standards applicable to defendants' motion for judgment notwithstanding the verdict are generally the same as those controlling motions for directed verdict [5 *Moore's Federal Practice,* Para. 50.07 (1969)], and were clearly stated in *Independent Iron Works v. United States Steel Corp.,* 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd.,* 322 F.2d 656 (9th Cir. 1963), *cert denied,* 375 U.S. 922 (1963).

> . . . plaintiff is entitled to and it must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a prima facie case. He must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture.

The essential inquiry on the conspiracy issue is whether Reynolds' decision to request a $1.9 million letter of credit from plaintiff Hallmark Industry was the result

of an agreement or rather the result of some non-conspiratorial motive.

The jury did not have to believe the testimony of Hall, Fox, Kibbey, or of any other witness for defendants Reynolds and Stanray. Mere disbelief, however, does not in and of itself, rise to the level of positive proof in the absence of other competent evidence suggesting alternative possibilities. *Dyer v. MacDougall,* 201 F.2d 265 (2d Cir. 1952); *Davis v. National Mortgagee Corp.,* 349 F.2d 175 (2d Cir. 1965). Of course, conspiracy is inherently difficult to prove except for the case in which one or more of the alleged conspirators are willing to testify against the defendant. Thus, courts will allow the jury to draw reasonable inferences from the facts before them. *Continental Baking Company v. United States,* 281 F.2d 137 (6th Cir. 1960); *Flintkote Company v. Lysfjord,* 246 F.2d 368 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957).

In this case, the jury had before them the following facts: (1) Reynolds had actively aided Hallmark in the preparation of its bid for a government contract; (2) Reynolds had also been working with Stanray in the development of its plans for this contract; (3) Stanray became aware of Reynolds efforts to aid Hallmark and contacted Reynolds to ascertain the nature and extent of these efforts; (4) Reynolds demanded of Hallmark a letter of credit for the full price of the prospective supply contract.

Assuming, firstly, that the letter of credit demand was unreasonable and assuming, secondly, that Reynolds stood to benefit from its refusal to supply Hallmark, this

together with the facts listed above would provide a sufficient basis for the jury to reasonably infer that a conspiracy did exist between Reynolds and Stanray. See *Continental Baking Co., supra; Flintkote Company, supra.*

The conspiracy issue thus turns on two points: (1) whether Reynolds' credit terms were unreasonable, and (2), whether Reynolds stood to benefit by refusing Hallmark's aluminum order. The matter of the reasonableness of the letter of credit demand was the subject of testimony at trial. Witnesses for the defendants testified that the credit demand was reasonable, and the plaintiff did little, if anything, to controvert this testimony. None of the parties introduced independent expert testimony as to the appropriateness of the letter of credit. Defendants argue that the wisdom of Reynolds' credit decision is not an issue because it is a matter of business judgment, relying on *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors,* 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). However, it is not the wisdom of this credit decision that is being challenged in the present case, but rather the motive underlying the credit demand.

The evidence presented at trial indicates no reason why Reynolds would favor Stanray over Hallmark. Had credit arrangements been resolved with Hallmark, Reynolds would have obtained a contract at $1,900,000, which plaintiff, throughout the trial, maintained would have given Reynolds a high profit. While Stanray may well have hoped that Hallmark would be unable to obtain aluminum, there is no reason to think that Reynolds would give up a substantial order and profit at the

request of Stanray when Reynolds itself would not have benefited. The unreasonableness of such action by Reynolds is further underscored by the fact that Reynolds could not have expected that its refusal to sell to Hallmark would result in the government awarding the contract to Stanray. There were at least two companies, Harvey Aluminum and Ador-Hilite, and probably others, who could supply Hallmark's aluminum needs. Ador-Hilite, in fact, did supply them.

In light of this record, the decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), is particularly in point. In that case, plaintiff claimed a conspiracy to boycott its sales of Iranian oil. The Supreme Court stated that if there was no evidence of an honest business motive for Cities Service's decision, a jury question might be presented as to Cities Service's reasons for refusing to deal with the plaintiff. However, there was such evidence: Cities Service feared dealing with the plaintiff because of possible unpleasant business consequences, including litigation, and there was no benefit to be gained by Cities Service in refusing to deal with the plaintiff. The inference for which the plaintiff contended was thus contradicted by evidence of non-conspiratorial motives; no advantage to Cities Service from refusing to deal with the plaintiff was proven. Accordingly the court held that the case should not be submitted to the jury, and ordered summary judgment for the defendant.

In the present case, Hallmark's financial position of near insolvency certainly indicated a non-conspiratorial motive on Reynolds' part for demanding reliable security

on the supply contract. In Reynolds' judgment, a letter of credit for the full contract price was necessary. This fact, when viewed together with the fact of the non-existence of any benefit to be gained by Reynolds in refusing to deal with Hallmark, leads inevitably to the conclusion that, as a matter of law, the jury could not have properly drawn an inference from the circumstances and terms of the letter of credit demand that the security requirement was the product of a conspiratorial arrangement between Reynolds and Stanray.

II. There Was No Prima Facie Evidence That The Acts Of The Defendants Caused Damage To The Plaintiff.

Plaintiff has the burden of proving that it suffered injury as a proximate result of defendants' Sherman Act violations. Furthermore, the fact of injury must be established with certainty. *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264-65 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 563 (1931); *Flintkote Co. v. Lysfjord, supra.* In the present case, plaintiff was required to demonstrate that the allegedly illegal acts of defendants cause plaintiff legally cognizable injury with respect to the aluminum hut contract. This, plaintiff did not, and indeed, could not, do.

The facts with regard to this argument may be briefly stated. The government contract that was the subject of this lawsuit was a negotiated contract under which, by law, the plaintiff-contractor was required fully, completely, and accurately to disclose to the government its estimated costs for performing this work before a contract would be executed. 10 U.S.C.A. § 2306(f). The con-

tract price then was determined, by agreement between the parties, by adding to these costs an 11% profit.

As required, plaintiff did submit such cost information to the government on the prescribed form DD 633. Although the form DD 633 carried the typewritten date of May 13, 1966. Mr. Whitt testified that he did not sign it until May 27, 1966, and the form, as transmitted to the government, contained the handwritten date of May 27.[1] As the testimony indicated, on the date he signed this form, Mr. Whitt was negotiating for aluminum with Harvey Aluminum and Ador-Hilite, either of whom were a part of any conspiracy in this case. Furthermore, on this same date plaintiff selected and made arrangements to purchase its final source of aluminum from Ador-Hilite.

It was plaintiff's claim in this case that had defendant Reynolds agreed on May 13, 1966, to furnish aluminum to the plaintiff for the contract under the escrow, plaintiff's actual cost for performance of the contract would have been less. Such reduced subcontract costs, of course, would doubtless have been known to plaintiff prior to May 27, certainly before the contract was executed on

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[1]As a matter of objective intent, Mr. Whitt's dated signature on May 27 communicated to the government that he was making a representation on that date. Because this was an essential contracting document in this transaction intending to communicate required cost information, it seems clear that Whitt by his own act caused that document to speak as of the date of signature. (Corbin, *Contracts* § 548). Furthermore, the duty of the contractor to provide accurate cost information to the government does not end with the submission of a DD 633 but rather requires the contractor to communicate any later significant information of which the contractor becomes aware between the time he makes his original disclosure and the actual contract signing. ASPR 32 C.F.R. § 3.807.4.

June 6, 1966. As a matter of law, plaintiff would have been required to divulge them to the government (10 U.S.C.A. § 2306(f); 32 C.F.R. § 3.807.4), and this in turn would have resulted in a reduction of the contract price so that it would not exceed the 11% profit rate on which the plaintiff and government had agreed. This reduction would have occurred as a part of the negotiations and required cost disclosure procedure leading to the contract execution; indeed, the plaintiff would not lawfully have been able to enter into a fully binding contractual relationship without full and frank disclosure. 10 U.S.C.A. § 2306(f). The procedure referred to above is to be distinguished from renegotiation which results in the recovery of excess profits due to cost changes occurring *subsequent* to the execution of the contract.

In summary, had plaintiff been able to enter into the allegedly advantagious subcontract arrangement with Reynolds, no cost saving, and thus no profit increase, could have been realized by plaintiff. As set forth above, plaintiff has suffered no legally recognizable injury on this contract; consequently, plaintiff has been unable to provide proof that the alleged agreement between the defendants caused it damages.

III. Section 1 of the Sherman Act Was Not Violated.

For many years the Sherman Act has been construed by the courts as prohibiting only those contracts or combinations which "unreasonably" restrain trade. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). From this standard a rule of *per se* unreasonableness has evolved in certain situations. Practices which

the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940); division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.*, 175 U.S. 211 (1899); tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392 (1947); and group boycotts, *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

Price fixing, territorial allocation, and tying arrangements are not contended by plaintiff to be involved herein, and there is no evidence in the record of such *per se* illegal activities. Furthermore, Reynolds and Stanray are not competitors with respect to the matters in controversy. Although plaintiff contends that they are in competition due to the fact that both submitted bids on the government contract for aluminum huts, plaintiff admitted that Reynolds' bid, at the very most, could only have been termed a complimentary or courtesy bid. It is obvious that, considering substance rather than form, Reynolds was in no way a true competitor of Stanray. The jury's acquittal of Harvey leaves as defendants only a supplier (Reynolds) and a customer, (Stanray), thus negating the possibility of a horizontal group boycott.

Accordingly, the alleged agreement between Reynolds and Stanray would not be illegal under Section 1 of the Sherman Act unless the record in this case shows that its effect was a substantial restriction upon the competitive conditions in the relevant industry. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 822 (1957); *Susser v.*

Carvel Corp., 332 F.2d 505, 517 (2d Cir. 1965). In other words, plaintiff had the burden of proving that the alleged Reynolds-Stanray agreement substantially and adversely affected competition in the relevant market for prefabricated aluminum buildings in Viet-Nam.

Plaintiff failed to establish this at the trial. The record is barren of evidence that the alleged agreement between Reynolds and Stanray appreciably damaged the competitive structure or substantially restricted competitive forces generally in the market for prefabricated aluminum buildings in Viet-Nam. In the absence of such a showing of harm, this Court is compelled as a matter of law to find that there was no violation of Section 1 of the Sherman Act and to grant defendants' motion for j.n.o.v. See *Richardson v. Chrysler Motors Corp.*, 257 F. Supp. 547 (S.D.Tex. 1966); *Fedderson Motors v. Ward*, 180 F.2d 519 (10th Cir. 1950).

Plaintiff must seek relief elsewhere than under Section 1 of the Sherman Act because he has not proven that defendants' conduct resulted in an undue limitation upon competitive conditions in the industry. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp 899 (D.Md. 1956), *aff'd. per curiam*, 239 F.2d 176 (4th Cir. 1956). Indeed, if the jury verdict in this case were allowed to stand, the economic and legal consequences would be disturbing. Actions for ordinary business tort would become federalized regardless of whether competition was appreciably affected. Any plaintiff claiming harm from the common law tort of interference with business relations would be lured to the federal courts by the prospect of recovering treble his actual damages plus his attorney's fee. The

courts have consistently stated that such an application of the anti-trust laws would be contrary to the intent of Congress and the purpose of the Sherman Act. *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), *cert. denied*, 374 U.S. 922 (1963); *Mackey v. Sears, Roebuck & Company*, 237 F.2d 869 (7th Cir. 1956), petition for cert. dismissed, 355 U.S. 865 (1957); *Hunt v. Crumboch*, 325 U.S. 821 (1945). This court will not disregard such authority.

MOTION FOR NEW TRIAL

Should this Court be reversed on its decision, as enunciated above, to grant defendants' motion for judgment notwithstanding the verdict, then it is just and proper that defendants' motion for a new trial be granted.

A motion for a new trial is addressed to the sound judicial discretion of the Court, and should be granted if it will do substantial justice. 6A *Moore's Federal Practice* § 59.05[5]. The trial judge has a responsibility to weigh the evidence and to set aside the jury's verdict, when, in his conscientious opinion, the verdict is contrary to the weight of the evidence. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1969).

This Court has conscientiously reviewed the testimony presented at trial and the applicable standards of law. For the reasons discussed above, which served as the basis for the granting of the judgment notwithstanding the verdict, this Court finds that for justice to be done, a new trial must be granted.

Defendants have raised other grounds in support of their motion for a new trial, but in light of the above,

it is unnecessary to rule on those contentions. Furthermore, since this Court has granted defendants' motion for judgment notwithstanding the verdict, it is unnecessary to act upon plaintiff's application for an attorney's fee.

It is hereby Ordered that defendants' motion for judgment notwithstanding the verdict be Granted, and in the alternative, that defendants' motion for a new trial be Granted should this Court's order for a judgment n.o.v. be reversed.

/s/ Robert F. Peckham
United States District Judge

Appendix "G"

United States Court of Appeals
for the Ninth Circuit

No. 26,915

Hallmark Industry,
Petitioner,
vs.
Honorable Robert F. Peckham, Judge of the United States District Court for the Northern District of California,
Respondent,
And
Reynolds Metals Company, and Stanray Pacific Corporation,
Real Parties in Interest.

ORDER

Before: Hamley and Hufstedler, Circuit Judges

The petition of Hallmark Industry for writs of mandamus and/or prohibition is denied on the ground that judgment was not entered until June 29, 1970, and respondent's motions for judgment notwithstanding the verdict and for a new trial were timely. (Rule 58, Fed. R. App. Proc.)

/s/ Frederick G. Hamley,
/s/ Shirley Hufstedler,
Circuit Judges.

Filed, February 11, 1971,
Wm. B. Luck, Clerk.